Supreme Court, U. S.
FILED
NOV 19 1980
MICHAEL RODAK, JR., CLERK

80-807

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No.

HERSCHEL BLUMBERG, *et al.*,

Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

LINOWES AND BLOCHER
JOSEPH P. BLOCHER
COUNSEL OF RECORD
BARBARA A. SEARS

8720 Georgia Avenue
Fifth Floor
Silver Spring, MD 20910
(301) 588-8580
Attorneys for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

HERSCHEL BLUMBERG
MARVIN BLUMBERG

Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

QUESTIONS PRESENTED

I. DOES THE EXISTENCE OF A CONSPIRACY BETWEEN GOVERNMENT ENTITIES TO REVOKE AND THE UNLAWFUL REVOCATION BY SAID GOVERNMENT ENTITIES OF A BUILDING PERMIT AND WATER AND SEWER PERMITS IN WHICH RIGHTS HAVE VESTED VIOLATE FEDERAL CONSTITUTIONAL GUARANTEES

UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND ENTITLE THE PERMIT HOLDER TO THE RETURN OF HIS PERMITS AND DAMAGES?

II. WHERE ADMINISTRATIVE REMEDIES TO REVIEW GOVERNMENTAL ACTIONS ON A BUILDING PERMIT AND SEWER AND WATER PERMITS IN WHICH RIGHTS HAVE VESTED ARE DOUBTFUL, UNKNOWN OR INADEQUATE, DO FEDERAL CONSTITUTIONAL GUARANTEES UNDER THE FIFTH AND FOURTEENTH AMENDMENTS MANDATE AN EXCEPTION TO THE DOCTRINE OF ADMINISTRATIVE REMEDIES?

III. IF THE EXISTENCE OF ADMINISTRATIVE REMEDIES TO REVIEW GOVERNMENTAL ACTIONS ON A BUILDING PERMIT AND SEWER AND WATER PERMITS IN WHICH RIGHTS HAVE VESTED DEPRIVES THE COURT OF JURISDICTION OVER CAUSES OF ACTION IN TORT AND CONFISCATION WHICH ARISE FROM THE SAME FACT SITUATION AND ARE NOT ABLE TO BE CONSIDERED ON ADMINISTRATIVE REVIEW, DOES IT VIOLATE FEDERAL CONSTITUTIONAL GUARANTEES UNDER THE FIFTH AND FOURTEENTH AMENDMENTS?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Parties to the Proceeding	1
Opinions Below	1
Jurisdiction	3
Constitutional Provisions, Statutes and Ordinances	3
Statement of the Case	5
Reasons for Granting the Writ	19
Conclusion	50

TABLE OF AUTHORITIES

Cases:	Page(s)
Agrarian v. Zoning Inspector of Harford County, 262 Md. 329, 277 A.2d 591 (1971) . . .	26
Arnold v. Prince George's County, 270 Md. 285, 311 A.2d 223 (1973)	22,49
Benton v. Maryland, 395 U.S. 784 (1969) . . .	22
Bloom v. State of Illinois, 391 U.S. 194 (1968) . . .	21
Board of Appeals v. Marina Apartments, 272 Md. 691, 326 A.2d 734 (1974) . . .	17,33,35
Board of Com'rs of Anne Arundel County v. Snyder, 186 Md. 342, 46 A.2d 689 (1946) . . .	20
Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1962)	20
Broddie v. Conn., 401 U.S. 371 (1971)	47
Buchanan v. Warley, 245 U.S. 60 (1917)	24
Burns v. Mayor and City Council of Midland, 247 Md. 548, 234 A.2d 162 (1967) . . .	22
Carey v. Baltimore County, 262 Md. 491, 278 A.2d 6 (1971) . . .	22
Carr v. Watkins, 277 Md. 578, 177 A.2d 841 (1962) . . .	22

Page(s)

Chicago, Burlington and Quincy Railroad Company v. City of Chicago, 166 U.S. 226 (1897) . 21

Columbia Real Estate Title Ins. Co. v. Caruso, 39 Md. App. 282, 384 A.2d 468 (1978) . . . 22

County Council for Montgomery County v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975) 20

Fuentes v. Shevin, 407 U.S. 67 (1972) 23

GAI Audio of New York, Inc. v. Columbia Broadcasting System, Inc., 27 Md. App. 172, 340 A.2d 736 (1975) . . . 22

Green v. Washington Suburban Sanitary Comm., 259 Md. 205, 269 A.2d 818 (1970) . . . 23

Greene v. United States, 376 U.S. 149 (1964) 25,39

Gross v. Lopez, 419 U.S. 565 (1975) 23

Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, 165 U.S. 150 (1897) . 48

James v. Prince George's County, ___ Md. ___, 418 A.2d 1173 (1980) 13

Jarvis v. Mayor and City Council of Baltimore, 248 Md. 528, 237 A.2d 446 (1968) . . . 22

Jones v. Union Guano Co., 264 U.S. 171 (1924) . . . 48

Page(s)

Katz v. Washington Suburban Sanitary Commission, 284 Md. 503, 397 A.2d 1027 (1979) . . 18,40,41

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) . . . 23

McKart v. United States, 395 U.S. 196 (1969) . . . 43

McNeese v. Board of Education, 373 U.S. 668 (1963) . . . 25,40

Munn v. Illinois, 94 U.S. 113 (1877) 23

N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers of America, 391 U.S. 418 (1968) 25

Pemberton v. Montgomery County, 340 A.2d 240, 275 Md. 363 (1975) 20

Pennsylvania Coal Co. v. Mahom, 260 U.S. 393 (1922) . . . 23

Poe v. Mayor and City Council of Baltimore, 241 Md. 303, 216 A.2d 707 (1966) . . . 26

Prince George's County, Maryland, et al. v. Herschel Blumberg, et al., 418 A.2d 1155, ___ Md. ___ (1980) . . . 1,2

Prince George's County, Maryland, et al. v. Herschel Blumberg, et al., 44 Md. App. 79, 407 A.2d 1151 2,15

Ross v. Montgomery County, 252 Md. 497, 250 A.2d 635 (1969) 20

Page(s)

Sanner v. Trustees of Sheppard and Enoch Pratt Hospital, 278 F. Supp. 138 (1968) . . 48

Secretary, Dept. of Human Resources v. Wilson, 286 Md. 639, 409 A.2d 713 (1979) . . . 26

Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926) . . . 25,26

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) . . . 23

Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946) . . . 27

Traux v. Corrigan, 257 U.S. 312 (1921) 48

Washington Suburban Sanitary Comm. v. TKU Asso., 281 Md. 1, 378 A.2d 505 (1977) . . . 23

Western Maryland Dairy, Inc. v. Chenowith, 180 Md. 236, 23 A.2d 660 (1942) . . . 22

Constitutional Provisions, Statutes and Ordinances:

United States Constitution, First Amendment . . . 46

United States Constitution, Fifth Amendment . . . 19,21,40, 42,43,46, 47

	Page(s)
United States Constitution, Fourteenth Amendment . .	19,21,40, 42,43,46, 47,48
Article 19, Declaration of Rights of Maryland . . .	47
Statutes:	
Article 41, Section 244-256A, Maryland Code (1957, 1980 Cum. Supp.)	18,41
Article 43, Section 387C(d)3, Maryland Code (1957, 1980 Repl. Vol.)	34
Article 25A, Section 5(U), Maryland Code (1957, 1973 Repl. Vol., 1980 Cum. Supp.) . . .	29,30,31
Courts and Judicial Proceedings Article, Section 3-409, Maryland Code (1957, 1980 Repl. Vol.)	46
Ordinances:	
Article X, Section 1013, Prince George's County Charter (1970)	13
Section 4-230, Prince George's County Code, 1972 . . .	34
Section 4-242, Prince George's County Code, 1972 (§§ 4-140 and 4-141 of 1975 Code) . .	27,28,29, 31,32

PARTIES TO THE PROCEEDING

Petitioners, Marvin and Herschel Blumberg ("Blumbergs"), pray that this Court issue a Writ of Certiorari to review the opinion and order of the Court of Appeals of Maryland filed in this case on August 22, 1980, and denied reconsideration on September 26, 1980. The parties before the Court of Appeals of Maryland were Prince George's County, Washington Suburban Sanitary Commission, William W. Gullett, Winfield M. Kelly, Jr., Marvin Blumberg and Herschel Blumberg.

OPINIONS BELOW

The case before the Court of Appeals of Maryland was captioned Prince George's County, Maryland, et al. v. Herschel Blumberg, et al., No. 147, September Term, 1979. This Opinion, filed August 22, 1980, has not been reported in the Maryland Reports. It is reported in the

Atlantic Reporter, Second Series, as Prince George's County, Maryland, et al. v. Herschel Blumberg, et al., 418 A.2d 1155 (1980). (App., 1-46) The Opinion of the Court of Special Appeals, captioned Prince George's County, Maryland, et al. v. Herschel Blumberg, et al., No. 152, September Term, 1979, is reported at 44 Md. App. 79, 407 A.2d 1151 (1979), and was filed by said Court on November 7, 1979. (App., 47-139) The case before the Circuit Court for Prince George's County, Maryland, was captioned Herschel Blumberg, et al. v. Prince George's County, et al., Equity D-7901, and the oral opinion of the Circuit Court was entered on May 9, 1978, and January 4, 1979. (App., 139-232) On January 30, 1979, the Circuit Court filed an Injunction, Declaration and Decree. (App., 233-236) Copies of all opinions and orders related thereto are reproduced in a separate Appendix to this Petition.

JURISDICTION

The Opinion of the Court of Appeals of Maryland was filed on August 22, 1980. A timely request for reconsideration was filed by petitioners (App., 240-293) and denied by the Court of Appeals on September 26, 1980. (App., 293) Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Listed below are the citations to Constitutional provisions, statutes and ordinances which this case involves. Due to the length of the verbatim text of these provisions, their pertinent text is set forth in the Appendix to this Petition at pps. 296-313.

Constitutional Provisions:

1. First Amendment, Constitution of the United States.

2. Fifth Amendment, Constitution of the

United States.

3. Fourteenth Amendment, Constitution of the United States.

4. Art. 19, Declaration of Rights of Maryland.

Statutes:

1. Article 25A, § 5(U), Maryland Code (1957, 1973 Repl. Vol., 1980 Cum. Supp.)

2. Article 41, § 244-256A, Maryland Code (1957, 1980 Cum. Supp.)

3. Courts and Judicial Proceedings Article, § 3-409, Maryland Code (1980 Repl. Vol.)

4. Article 43, § 387C(d)3, Maryland Code (1957, 1980 Repl. Vol.)

Ordinances:

1. Article X, § 1013, Prince George's County Charter (1970)

2. Section 4-230, Prince George's County Code, 1972

3. Section 4-242, Prince George's

County Code, 1972 (§§ 4-146 and 4-141, 1975 Code)

STATEMENT OF THE CASE

The Blumbergs are owners of a large tract of land in Hyattsville, Prince George's County, Maryland, which they have developed with mixed office, retail and residential uses. As part of this development, the Blumbergs have planned to construct a high-rise residential building ("Plaza Towers") since 1958. In 1971, aware of governmental restrictions regarding sewer service, the Blumbergs confirmed that service would be available to Plaza Towers with the Washington Suburban Sanitary Commission ("WSSC"), the water and sewer agency servicing the County. Assured that service would be available, the Blumbergs made formal application to WSSC for water and sewer service which was granted on October 25, 1972. On November 13, 1972, plumbing permits for Plaza Towers were issued by the WSSC.

On October 6, 1972, the Blumbergs filed an application with Prince George's County ("County") for a building permit for Plaza Towers. On October 17, 1972, the Prince George's County Council ("Council") adopted a bill providing for the licensure of building contractors and sent it to then County Executive William W. Gullett ("Gullett") for signature. Gullett signed the bill on November 1, 1972, and it took effect on January 1, 1973. Any person furnishing character references, evidence of financial responsibility, training and experience, and a $25.00 fee was entitled to a license. No examination was required. The bill did not declare any permit inappropriately issued to be invalid. The only sanction provided was a criminal penalty for doing business as a contractor without a license.

On January 25, 1973, the County issued a building permit to the Blumbergs for the construction of Phase I of Plaza Towers. A second building permit, for Phase II, was issued on

February 23, 1973. Thereafter, on March 14, 1973, the building permits were merged by the County into a single building permit.[1] Each of the permits were issued based upon a written application showing the contractor to be the Blumbergs. Although the County Department of Licenses and Permits was responsible for issuing both building permits and contractor's licenses, no question was ever raised about the Blumbergs not being licensed. By word of mouth, the Blumbergs heard that the County might take their building permit and use the license law to do so. Therefore, the Blumbergs filed an application, dated March 28, 1973, for a building contractor's license. On April 5, 1973, the Blumbergs received a temporary license and, on April 17, 1973, a permanent license.

On March 29, 1973, construction of Plaza

---

[1]The building for which the building permit was issued contained two towers: the first tower consisted of a 35-story apartment tower, parking garage, lobby and penthouses and, the second, a 27-story apartment tower, parking garage, lobby and penthouses.

Towers commenced. Excavation for the structure was completed and a huge concrete mat foundation poured. The first footing was poured on March 30, 1973, and footings continued to be poured every day or every other day with the County regularly inspecting and approving all work done.

On April 12, 1973, the County served the Blumbergs with a stop work order. This order was followed by a letter dated April 12 from the Chief Building Inspector advising that the building permit had been "illegally issued" because the contractor listed on the permit "does not possess a valid residential building contractor's license" and, therefore, "[t]he permit is . . . null and void". The letter also stated that upon proof of licensure, the permit would be reissued. The Blumbergs immediately notified the County that they were licensed contractors.

After receiving objections to the height and density of Plaza Towers from certain citi-

zens' groups and despite the findings of its general counsel that the WSSC had properly authorized the issuance of water and sewer permits for Plaza Towers, on April 11, 1973, the WSSC ordered the "efficacy" of the water and sewer permits suspended. The WSSC's actions occurred subsequent to the receipt by its Chairman of a phone call from an agent of William Gullett. The WSSC Chairman was advised by Gullett that a decision had been made to recall the building permit and "that we [WSSC] should follow suit". Therefore, without notice to the Blumbergs, the WSSC adopted an Order, completely contrary to the County's letter of April 12 to the Blumbergs, suspending the efficacy of the water and sewer permits and stating that (1) the County Executive [Gullett] had withdrawn the building permit for Plaza Towers and advised that he planned to recirculate the permit to the WSSC and (2) the WSSC would consider all questions raised with regard to the water and sewer permits, including current

sewer flow data, at the time of this further review. Subsequent to the WSSC's action, its Chairman called Gullett's office and advised that the WSSC had acted upon his request. Thereafter, on April 19, 1973, the Chief Building Inspector sent a second letter to the Blumbergs stating that in addition to the contractor's license, the Blumbergs would have to resolve the suspension of their water and sewer permits prior to the reissuance of their building permit.

The Blumbergs met with Gullett, who told them that the height of the building was the real problem. Convinced they had no choice, the Blumbergs offered to reduce the height, and Gullett represented that the building permit would be issued if the height were reduced to two 27-story towers. On May 8, 1973, the Blumbergs filed an application for a revised building permit. When this application was not processed, the Blumbergs contacted Gullett, who stated that the WSSC was the cause of the

delay and that he could do nothing about it.

On May 23, 1973, the WSSC held a meeting regarding the suspension of the water and sewer permits. Then, on May 30, 1973, the WSSC issued an order revoking the permits. Prior to this action, the Chairman of the WSSC received a phone call from the Council advising of certain councilmembers' opposition to Plaza Towers. A letter expressing this opposition followed. The Chairman of the WSSC testified that he understood the verbal request to be a direction from the Council that no water and sewer permit should be issued for Plaza Towers and that the revocation of the water and sewer permits was the result. Without water and sewer permits, the building permit could not be reissued under County and State law and by the terms of the County's April 19, 1973, letter.

On July 10, 1973, the Blumbergs filed a bill of complaint naming the County, WSSC and Gullett as defendants and seeking the return of the water and sewer and building permits. In

October, 1976, an amended bill was filed seeking the return of the permits and damages.[2] The Blumbergs alleged that they had acquired vested rights in their permits and that the actions of the defendants constituted a deprivation of property without due process and equal protection of law and amounted to a taking of their property without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. (App., 323-324; 107) The Circuit Court directed the County and WSSC to reissue the permits, awarded judgment for $3,673,919.00 against the County and in favor of the Blumbergs, sustained demurrers by Gullett and Kelly and dismissed the action for damages against the WSSC on the ground of sovereign immunity. (App., 233-236)

The Circuit Court found that the County, which had waived its immunity in tort by sta-

---

[2]The amended bill also added Winfield M. Kelly, Jr. ("Kelly"), then County Executive, as a defendant.

tute (Art. X, § 1013, Prince George's County Charter (1970)), was liable in damages for tortious interference with the Blumbergs' vested property rights, conspiracy to commit same and taking of private property without compensation.[3] (App., 139-198) In describing the reason for revoking the permits, the Circuit Court stated:

> "We conclude that the building permit in this case was improperly revoked. It was a valid permit when it was issued. It was subterfuge, under which it was revoked, and there was no legal significance, no practical effect, no basis for that action, except as an excuse to stop a project which the Executive, at that time, had come to believe was politically unpopular with the people in the area. It was unpopular with the people in the area, and therefore politically unprofitable to him." (App., 188-189)

The Circuit Court continued:

> "What happened in that case was that

---

[3]By Art. X, § 1013 of its Charter, the County waived its liability for any action for which it would be directly liable in tort and for any conduct of its officials, employees and agents which would be actionable "... notwithstanding the status or personal amenability to suit of the individual agent who commits the tort." James v. Prince George's County, ___ Md. ___, 418 A.2d 1173, 1181 (1980).

the County didn't really have any firm grounds about this permit thing. That, obviously, was the flimsiest, plainest sort of subterfuge. The only advantage it had was that it was immediate. It stopped right where you are, whereas the action by the Sanitary Commission had to have a little bit more deliberation, or two more people were involved in it. Who knows. Maybe somebody down at the Sanitary Commission would say, 'Don't do this. It's wrong.'

So having stopped the project immediately, it then instructed somebody from the Sanitary Commission to withdraw or do something to say that he doesn't have sewerage, and the Commission, in response to that, did something of what they call suspending the efficacy of the permits which, in effect, says you don't have sewerage any more, and then, eventually, they come up with this business about the fact that they were illegally issued, and therefore, they were void, and therefore, we are sorry but you don't have sewerage any more.

We don't think that government ought to act with such a demonstrated lack of integrity, and we think that the principal of law that a person has the vested right in a permit such as this was designed to protect the citizen who does everything that he is supposed to do from the arbitrary and capricious whims of political winds in the area." (Emphasis supplied; App., 178-180)

The Court of Special Appeals, commencing its opinion with the statement: "This is a case of government running amok", found that the evidence fully supported the Circuit Court's findings.

> "There is no question that Gullett orchestrated what occurred, that he had no authority whatever to do it, that he did it for wholly improper reasons, and that he did it deliberately, knowing full well the consequences of his action. The evidence fully supports the court's conclusions that he acted arbitrarily, capriciously, with lack of integrity, and for improper motives." (App., 105)

The Court of Special Appeals affirmed all actions of the Circuit Court except the Court's calculation of damages against the County and its determination that the WSSC was immune. The Court of Special Appeals remanded this portion of the case to the Circuit Court with instructions (i) that $1.5 million was not an appropriate element of damages, (ii) to redetermine by clarifying $1.8 million of the damage award, and (iii) to determine whether and to what extent a judgment for damages should be

entered against the WSSC.

The Court of Appeals granted certiorari to review, inter alia, the contention of the County that the Circuit Court lacked jurisdiction over the case because the Blumbergs had failed to appeal the actions of the County on the building permit to the County Board of Appeals ("Board").[4] This contention had been raised by the County for the first time at trial in its verbal motion to dismiss at the close of the Blumbergs' evidence. The Circuit Court rejected the contention as did the Court of Special Appeals, both finding the statutory jurisdiction of the Board to be highly questionable and the remedy, if it existed, to be entirely inadequate. This was so since the

[4]The Court of Appeals granted certiorari on eight other issues: (1) liability of the County in damages to the Blumbergs, (2) application of the statute of limitations to the Blumbergs claim for damages and application of statutory provisions requiring notice to the County of a suit for liquidated damages, (3) possible maximum limitation by statute of the liability of the County to damages, (4) action of Court of Special Appeals on demurrers of Gullett and Kelly, (5) and (6) rulings of Court of Special Appeals on two aspects of the calculation of damages, (7) immunity of the WSSC from damages, and (8) reissuance of the water and sewer permits.

Board of Appeals, as found by the Court of Appeals of Maryland in Board of Appeals v. Marina Apts., 272 Md. 691, 326 A.2d 734 (1974), had no authority whatsoever over the WSSC and could not, therefore, order the return of the water and sewer permits, a prerequisite to the reissuance of the building permit and to the construction of the building.

The Court of Appeals concluded that the Blumbergs had failed to exhaust "available" administrative remedies and dismissed the case against the County and the WSSC without reaching the merits. Thus, the Court of Appeals found that despite the fact that (i) the law prohibited the grant of a building permit when no water and sewer permit had been issued, (ii) the Board had no authority to reissue the water and sewer permits, and (iii) even if it is assumed that the building permit could have been issued by the Board irregardless of County and State prohibitions against it, the building permit would have been worthless since the

building could not be built without a water and sewer permit, the administrative remedy of appeal to the Board was not so inadequate as to authorize judicial intervention before exhaustion. The Court of Appeals further concluded that the action should be dismissed against the WSSC for failure to exhaust administrative remedies although the WSSC never raised the issue, since in a 1979 Court of Appeals opinion, Katz v. Washington Suburban Sanitary Commission, 284 Md. 503, 397 A.2d 1027 (1979), the WSSC was declared a State agency. Therefore, the Court found that as a State agency, the State Administrative Procedures Act ["APA": See Article 41, § 244-256A, Maryland Code (1957, 1978 Repl. Vol.)] was applicable to the WSSC and, although the WSSC had not been treated as a State agency for purposes of the APA prior to 1979, the Blumbergs should have followed this procedure in 1973.

On September 19, 1980, the Blumbergs filed a motion for reconsideration again raising the

violations of their federal constitutional rights if the doctrine of administrative remedies is applied as the Court of Appeals has done in this case. (App., 240-292) This motion was denied by the Court of Appeals on September 26, 1980. (App., 293)

REASONS FOR GRANTING THE WRIT

The decision below conflicts with decisions of this Court as to (i) violations of the constitutional provisions against deprivation of property by a State without due process of law and taking of property without compensation, and (ii) the proper application of the doctrine of administrative remedies.

A. The existence of a conspiracy to revoke and the unlawful revocation by the County and WSSC of the Blumbergs' building permit and sewer and water permits in which the Blumbergs' rights had vested violates the Blumbergs' constitutional rights under the Fifth and Fourteenth Amendments and entitles the Blumbergs to

the return of their permits and to damages for the violations.

Under Maryland law, the Blumbergs acquired vested rights in their building permit and water and sewer permits. Property rights are not created by the Constitution.

> "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1962).

The test in Maryland to determine if one has acquired a vested right in a permit is (1) whether a permit has been obtained and (2) whether one has proceeded under the permit to exercise their rights on the land by commencement of construction. County Council for Montgomery County v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975); Pemberton v. Montgomery County, 340 A.2d 240, 275 Md. 363 (1975); Board of Com'rs of Anne Arundel County v. Snyder, 186 Md. 342, 46 A.2d 689 (1946); Ross v. Mont-

gomery County, 252 Md. 497, 250 A.2d 635 (1969).

Applying this test to the facts of the instant case demonstrates that the Blumbergs, as found by the Circuit Court and Court of Special Appeals, had unequivocably acquired vested rights in their permits. The Fifth and Fourteenth Amendments forbid both the Federal Government and State Government from depriving any person of property without due process of law. Bloom v. State of Illinois, 391 U.S. 194 (1968). The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, Chicago, Burlington and Quincy Railroad Company v. City of Chicago, 166 U.S. 226 (1897), prohibits not only the deprivation of property without due process of law, but also, the taking of property without just compensation.

Once it is determined that a guarantee of the bill of rights is fundamental to the American scheme of justice, the same con-

stitutional standards apply with reference to both the State and Federal Governments. Benton v. Maryland, 395 U.S. 784 (1969).

The actions of the County and WSSC in revoking the Blumbergs' permits constituted a deprivation of private property without due process of law, tortious interference with the Blumbergs' vested property rights and a taking without compensation. Arnold v. Prince George's County, supra; Carey v. Baltimore County, 262 Md. 491, 278 A.2d 6 (1971); Jarvis v. Mayor and City Council of Baltimore, 248 Md. 528, 237 A.2d 446 (1968); Burns v. Mayor and City Council of Midland, 247 Md. 548, 234 A.2d 162 (1967). In addition, the confederation of the County and WSSC to stop the project, an unlawful act, constituted an actionable conspiracy for which the County and WSSC are liable in damages. GAI Audio of New York, Inc. v. Columbia Broadcasting System, Inc., supra; Columbia Real Estate Title Ins. Co. v. Caruso, 39 Md. App. 282, 384 A.2d 468 (1978); Western

Maryland Dairy, Inc. v. Chenowith, 180 Md. 236, 23 A.2d 660 (1942); Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962); Washington Suburban Sanitary Comm. v. TKU Asso., 281 Md. 1, 378 A.2d 505 (1977); Green v. Washington Suburban Sanitary Comm., 259 Md. 205, 269 A.2d 818 (1970).

The action of the Court of Appeals in dismissing the case against the County and WSSC for failure to exhaust administrative remedies and sustaining the judgment of the Court of Special Appeals as to Gullett and Kelly denies the Blumbergs the aforestated protections of the Fifth and Fourteenth Amendments. It is fundamental that vested rights are property rights protected by the guarantees of the Fifth and Fourteenth Amendments. Fuentes v. Shevin, 407 U.S. 67 (1972); Gross v. Lopez, 419 U.S. 565 (1975); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Pennsylvania Coal Co. v. Mahom, 260 U.S. 393 (1922); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Munn v.

Illinois, 94 U.S. 113 (1877); Buchanan v. Warley, 245 U.S. 60 (1917). Here is a case where two courts found that (i) a conspiracy existed between the County and WSSC to unlawfully deprive the Blumbergs of a property right without due process of law and without compensation, (ii) that the Blumbergs were deprived of a property right without due process of law and without compensation, and (iii) that the Blumbergs suffered substantial damages as a result.

The decision of the Court of Appeals denies all relief to the Blumbergs and thereby operates to affirm a proven deprivation of property without due process of law and a taking without compensation in complete contravention to applicable decisions of this Court. Thus, fundamental federal rights have not only been openly and maliciously violated by the County and WSSC, but also, the Blumbergs have been, by the decision of the Court of Appeals, denied their federal constitutional protec-

tions against these blatent violations. For these special and important reasons, this Court should grant certiorari to review the decision of the Court of Appeals in this case.

B. Where purported administrative remedies to review the actions of the County and WSSC on the Blumbergs' building permit and sewer and water permits are doubtful, unknown and inadequate, constitutional due process and prohibition against the taking of property without compensation mandates an exception to the doctrine of administrative remedies.

This Court holds that impossibility or improbability of obtaining adequate relief is a reason for dispensing with the exhaustion requirement. N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers of America, 391 U.S. 418 (1968); Greene v. United States, 376 U.S. 149 (1964); McNeese v. Board of Education, 373 U.S. 668 (1963); Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926). The same exception is recognized by the Court of Appeals of

Maryland. Poe v. Mayor and City Council of Baltimore, 241 Md. 303, 216 A.2d 707 (1966); Agrarian v. Zoning Inspector of Harford County, 262 Md. 329, 277 A.2d 591 (1971); Secretary, Dept. of Human Resources v. Wilson, 286 Md. 639, 409 A.2d 713 (1979).

In Smith v. Illinois Bell Tel. Co., supra, this Court indicated that the reason for the exception is to protect a complainant's constitutional rights.

> "Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to awart a decision of the rate making tribunal before applying to a federal court for equitable relief." (270 U.S. 587, 591-592)

In like manner, this Court holds that where there is such uncertainty concerning the adequacy of a State remedy as to make it speculative whether that remedy affords full protection of federal rights, exhaustion will not be

required. Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946). The decision below thus conflicts with applicable decisions of this Court dispensing with the exhaustion requirement when the remedy is doubtful, unknown or inadequate.

In the instant action, the Court of Appeals, contrary to the Circuit Court and Court of Special Appeals, found that an administrative remedy existed with regard to the actions of the County concerning the Blumbergs' building permit and that the existence of this administrative remedy, an appeal to the County Board of Appeals ("Board"), deprived the Circuit Court of jurisdiction. As a result, the Court of Appeals dismissed the case against the County. The holding of the Court of Appeals regarding the existence of an administrative remedy rests on its determination that § 4-140 of the County Code[5], providing for appeals to

---

[5]Cites are to the most recent (1975) Prince George's County Code, unless a material change since 1972 has occurred.

the Board, does not limit the jurisdiction of the Board to appeals from decisions of the Building Official refusing to grant a modification of a requirement of the Basic Code or Subtitle 4 of the County Code ("Buildings Chapter"). The Court of Appeals found that the second sentence of § 4-140: "[a]pplication for appeal may be made when it is claimed that: The true intent of the Basic Code or this Ordinance [Buildings Chapter] has been incorrectly interpreted or applied", permits appeals by an aggrieved party from <u>all</u> decisions of the Building Official with regard to building permits, including not only refusals to modify the Basic Code or Buildings Chapter, but also, issuance, revocation, suspension and amendment

of a building permit.[6]

Prince George's County as a charter county may exercise only those legislative powers expressly granted to it pursuant to the Express Powers Act, Md. Code (1957, 1973 Repl. Vol., 1980 Cum. Supp.). Article 25A, Section 5(U), Maryland Code (1957, 1973 Repl. Vol., 1980 Cum. Supp.), specifically delegates to chartered counties the authority to enact local laws to provide for a county board of appeals to review certain specified actions of an administrative officer or agency. In pertinent part, this Section grants and confers upon said counties the power

---

[6]Section 4-140 provides:

> "The owner or occupant of a building or structure or any directly aggrieved person may appeal to the board of appeals from a final decision of the Building Official refusing to grant a modification of the provisions of the Basic Code or this Ordinance. Application for appeal may be made when it is claimed that: The true intent of the Basic Code or this Ordinance has been incorrectly interpreted or applied, notice of such appeal shall be in writing and filed within thirty (30) days after the decision is rendered by the Building Official." (Emphasis supplied)

> "[t]o enact local laws providing (1) for the establishment of a county board of appeals . . . and (4) for the decision by the board on petition by any interested person . . . of such of the following matters arising (either originally or on review of the action of an administrative officer or agency) under any law, ordinance, or regulation of . . . the county council, as shall be specified from time to time by such local laws enacted under this subsection: . . . the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exception, waiver, certificate, registration, or other form of permission or any adjudicatory order . . ." (Emphasis supplied)

Section 5(U) is an authorization. If the entitlement of § 5(U) is exercised, the statute requires the enactment of local legislation to (1) establish a board of appeals and (2) specify which of the enumerated matters in § 5(U), i.e., issuance, denial, revocation, suspension, annulment, or modification, the board is to review. The County, by § 2-111 of the County Code, created a Board of Administrative Appeals "to hear and determine all administrative appeals allowed by ordinance or law,"

excepting three situations not here relevant. Section 4-140 of the County Code provides for an appeal to the Board "from a final decision of the Building Official refusing to grant a modification of the provisions of the Basic Code or this Ordinance." See footnote, p. 29, supra. Thus, § 4-140 specifies only "modification" and excludes any reference to the issuance, renewal, denial, revocation, suspension or annulment of a permit. See Article 25, Section 5(U). Since no local law was enacted under the Buildings Chapter as required by Article 25A, § 5(U), to grant the Board authority to review anything other than a refusal to grant a modification, the Board had no authority to review the actions of the County in this case.

Further, when a requested modification has been denied, an aggrieved person may appeal to the Board when he contends "[t]hat the true intent of the Basic Code or of this Ordinance has been incorrectly interpreted or

applied". See § 4-140. This does not extend the jurisdiction of the Board to review stop work orders or declarations by the Building Official that a building permit previously issued is null and void, matters at issue in this case, but rather allows an aggrieved person, i.e., one who has been denied a modification of the Building Code or Buildings Chapter to argue that the Board is not bound by the literal terms of the Ordinance but may modify such terms by considering the Ordinance as a whole in order to effect the intent thereof. Thus, the second sentence of § 4-140 of the County Code does not extend the jurisdiction of the Board, as found by the Court of Appeals, but merely allows an applicant, whose very case is founded upon a request to do other than the express language of the legislation permits, to free himself from the established principle of law that the intent of the legislature is first to be found in the express language of the legislation.

The Blumbergs contend that for the above reasons, no administrative remedy existed to review the actions of the County. However, if it is assumed for the sake of this argument that an appeal to the Board as found by the Court of Appeals existed to review the actions of the County, the remedy was entirely inadequate necessitating an exception to the doctrine to protect the Blumbergs' federal constitutional rights. All parties and the Court of Appeals of Maryland acknowledge that under Board of Appeals v. Marina Apartments, supra, the Board has no jurisdiction over the WSSC and cannot, therefore, countermand a decision of the WSSC with regard to sewer service. This leaves the Board powerless to require the return of sewer and water permits if revoked by the WSSC. Despite this infirmity, the Court of Appeals concluded that the Blumbergs were required to "follow the exclusive review procedures of Prince George's County with regard to the Building Official's actions". The Court

found that although the Board had no jurisdiction to review the actions of the WSSC, this did not make an appeal to the Board inadequate, or excuse its use. Thus, it is concluded that the Board could have ordered the restoration of the Blumbergs' building permit despite the revocation of the sewer and water permit contrary to County and State law which required a sewer permit to issue prior to the issuance of the building permit. See Art. 43, § 387C(d)3, Maryland Code (1957, 1980 Repl. Vol.) and § 4-230, Prince George's County Code, 1972.[7]

The patent injury to the Blumbergs which results from the Court's finding that the declared administrative remedies were available and adequate belie the validity of the existence of this exception and conflict with decisions of this Court on the application of

---

[7] As to Art. 43, § 387C(d)3, it is noted that Chapter 618, Acts of 1975, effective July 1, 1974, added all of subsection 3 of subsection (d) following the first sentence therein. This, however, did not change or expand the provision but merely elaborated on the requirement as stated therein.

the doctrine by administrative remedies. If this case does not present a situation where administrative remedies, if found to exist, are inadequate, then there is no case where such a finding can be made. Here is a situation where the law prohibited the grant of a building permit if a sewer and water permit had not been issued. At a time when strict moratoria existed throughout the County, and in view of Board of Appeals v. Marina Apartments, supra, there is no reason to believe that the Board would have the authority to circumvent the findings of the WSSC that sewer service was not adequate to serve Plaza Towers and reissue the building permit.

Further, even if it is assumed that the building permit could have been issued by the Board irregardless of County and State prohibitions against it, the permit would be entirely worthless. The building could not be built without a sewer and water permit. The Court of Appeals concluded that an administra-

tive remedy is not so inadequate to authorize judicial intervention before exhaustion "because it is intended with delay, expense, annoyance, or even some hardship". The facts of this case as found by both the Circuit Court and Court of Special Appeals as they relate to administrative remedies create a situation which goes far beyond mere inconvenience, annoyance, or some hardship if administrative remedies are followed. Actual malice was found on the part of William Gullett, County Executive of Prince George's County, with regard to his actions in stopping the Blumbergs' project, as well as a conspiracy between the County and WSSC to unlawfully stop the project, a project in which the Blumbergs had obtained vested rights. The sewer and water permits were not revoked because of any "mistake" by the WSSC concerning the application of its own resolutions; the sewer and water permits were not revoked because of any inadequacy of treatment capacity; the sewer and water permits were re-

voked because Gullett instructed the WSSC to revoke them and the WSSC acquiesced in this improper, illegal and malicious action. The building permit was not revoked because of the existence of a "building contractor's law" but solely on the basis of political pressure. This is what the proof showed, this is what the Circuit Court found, and this is what the Court of Special Appeals affirmed.

This is hardly a case where "some hardship" is entailed by following an administrative remedy. The project was a $27 million project on which all architectural and engineering work was completed, subcontracts for construction let and construction firmly and in good faith under way. In view of a factual backdrop of admitted malice and conspiracy between public bodies to deprive the Blumbergs of vested property rights, to hand the Blumbergs a useless building permit valid for six months only and to require them to pursue the WSSC, a co-conspirator and joint tort-feasor, in a se-

cond administrative proceeding (the existence of which would not be known to the general public for many years - see pp. 40-43) simply cannot be found to present "effective", "available" or "adequate" administrative remedies for the protection of the Blumbergs' federal constitutional rights - not in 1973 and not to the Blumbergs on the facts of this case.

The doubt associated with the jurisdiction of the Board to afford any relief whatsoever, and, even if a remedy was available from the Board, the incomplete nature of it to protect the Blumbergs' constitutional rights under the Fifth and Fourteenth Amendments, coupled with the fact that the application of the Administrative Procedures Act to the WSSC was not known, when weighed against the actions of the County and WSSC, illustrative of the worst in abuse of governmental power, go well beyond the degree of hardship and inconvenience that can be associated with an administrative remedy before a finding of inadequacy is made.

Such does not amount to mere inconvenience or some hardship but deprives the Blumbergs of their constitutional protections against deprivation of property without due process of law and against the taking of property for public use without compensation through doubtful and inadequate paper exercises.

In Greene v. United States, supra, this Court found certain administrative remedies to review a claimant's eligibility for monetary restitution under Department of Defense regulations were inadequate and need not be followed. The Court stated:

> "Since in this case the only available administrative procedure entailed the burden of presenting a claim under an inapplicable and substantially revised regulation, that procedure must be regarded as inappropriate and inadequate and therefore need not be pursued." (376 U.S. 149, 164)

Thus, the Court of Appeals' decision in the instant action conflicts with decisions of this Court as to the proper application of the doctrine of administrative remedies.

The Blumbergs asserted that the actions of the County and WSSC deprived them of property without due process of law and constituted a taking without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Since Maryland law does not provide the Blumbergs with an administrative remedy sufficiently adequate for protection of their federal constitutional rights, their protection requires an exception to the doctrine of administrative remedies. McNeese v. Board of Education, supra.

Although never raised by the WSSC, the Court of Appeals concluded that the suit against the WSSC must also be dismissed for failure to exhaust administrative remedies. In Katz v. WSSC, supra, decided by the Court of Appeals in 1979, it was held that the WSSC is an agency of the State. Therefore, the Court of Appeals concluded below that the WSSC's procedures are governed by the State Administra-

tive Procedures Act, Article 41, §§ 244-256A, Maryland Code (1957, 1978 Repl. Vol., 1980 Cum. Supp.) ("APA") and that the Blumbergs should have appealed the actions of the WSSC to the Circuit Court under the APA. Thus, this appeal would have had to have been taken in 1973, six years before the Court of Appeals held in Katz that the WSSC should be treated as an agency of the state. Prior to Katz, and certainly in 1973, the WSSC was not considered an agency of the state for purposes of the application of the APA.

It has long been said that the rule requiring exhaustion of remedies is supported by sound reasons. Fundamentally, these reasons deal with the fact that an administrative agency with its expertise is the most efficient and effective body to deal with an issue in its purview. This and the known jurisdiction of an agency to determine the issues raised by an appeal are what make an administrative remedy effective and adequate. However, none of these

reasons are present when the status of the WSSC is examined in 1973. There was no comprehensive remedial scheme established for administrative review. There was no intermediate administrative appeal, no board of review, no mechanism whatsoever for the expertise of the agency to be exercised on an appellate level, thus defeating the underlying reason and purpose for the exhaustion doctrine. Since no one was aware that the WSSC would be constituted an agency of the state for purposes of the application of the APA, no structure whatsoever existed to effectuate the requirements of the APA.

An administrative remedy is not adequate to protect the Blumbergs' Fifth and Fourteenth Amendment rights, if it was not known to exist, would not be known to exist for several years, and was not acknowledged or practiced by the very agency in question. An administrative remedy is not adequate to protect the Blumbergs' Fifth and Fourteenth Amendment

rights when no procedures, as mandated by the APA, are enacted by the agency to allow for and to provide a record that may be reviewed on appeal and to assure a fair hearing. An administrative remedy is not adequate to protect the Blumbergs' Fifth and Fourteenth Amendment rights if, by lack of procedures, standards and review, each and every purpose cited by this Court for the existence of the doctrine of exhaustion of administrative remedies is defeated. McKart v. United States, 395 U.S. 196 (1969). Such is the situation in the instant case. There existed no available, adequate and effective administrative remedy to review the actions of the WSSC in this case.

C. The purported existence of administrative remedies relating to the review of the actions of the County and WSSC on the Blumbergs' building permit and sewer and water permits (i) were not exclusive and (ii) did not deprive the Court of jurisdiction over causes of action for damages in tort and confiscation

which arise from the same fact situation.

If, contrary to the position of the Blumbergs, administrative review of the actions in the County and WSSC was available to the Blumbergs, such review was not exclusive and the Circuit Court did not err in exercising jurisdiction over this case. The County did not raise the defense of exhaustion of administrative remedies until the close of the Blumbergs' case. At no time did the WSSC raise the exhaustion doctrine. Thus, the application of the doctrine must be determined based on the evidentiary record made. Based on the record, not only did the Blumbergs establish facts entitling them to the declaratory and injunctive relief prayed with regard to the permits, but also, facts entitling them to receive damages. The Blumbergs' damage claims are independent from the issue of whether their permits should be restored. To recover damages, the Blumbergs are not required to exhaust administrative remedies but only to establish that there had

been one of the following: (i) tortious interference with their vested property rights, (ii) a civil conspiracy, (iii) a deprivation of their property without due process or (iv) a taking of private property without compensation.

The Board of Appeals or the Circuit Court under the APA has no authority to render a binding judgment or to award damages. Damage claims such as the Blumbergs' are cognizable in the Circuit Court as an original matter. If the reasoning of the Court of Appeals with regard to the availability of administrative remedies is accepted, then the case also raises issues, through its claims for declaratory relief, which relate to subject matter falling within the special expertise of an administrative agency. However, since the tort and constitutional claims presented are plainly matters of which the Circuit Court has jurisdiction, even if it is assumed that administrative remedies existed to review the question of restoration of the permits, jurisdiction to

issue declaratory relief and to restore the permits was shared between the Board of Appeals and Circuit Court. Thus, the Circuit Court properly awarded declaratory relief pursuant to Courts and Judicial Proceedings Article, § 3-409(c), Maryland Code (1980 Repl. Vol.), wherein it is stated:

> "A party may obtain a declaratory judgment or decree notwithstanding a concurrent common law, equitable, or extraordinary legal remedy, whether or not recognized or regulated by statute." (Emphasis supplied)

However, again assuming that administrative remedies existed to review the questions raised concerning the restoration of the Blumbergs' permits and these remedies were exclusive with no exception to the doctrine applicable, the Blumbergs were denied access to the courts to assert their damage claims in violation of the guarantees of the First, Fifth and Fourteenth Amendments to the Constitution of the United States. Despite the power of the Circuit Court to restore the permits, the Court had original jurisdiction of the damage claims

presented and these claims must not be dismissed on the basis of the exhaustion doctrine. To do so is to deny the Blumbergs access to the courts to assert their tort and constitutional claims and to deprive the Blumbergs of property without due process of law or compensation in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States. Broddie v. Conn., 401 U.S. 371 (1971).

The Fourteenth Amendment provides that "[n]o State shall deprive any person of life, liberty, or property, without due process of law . . ."

Article 19 of the Declaration of Rights of Maryland guarantees a remedy to all persons for injury to property.

> "That every man, for an injury done to him in his person or property, ought to have a remedy by the course of the Law of the land, and ought to have justice and right, freely without fail, fully without any denial, and speedily without delay according to the Law of the Land."

The rights guaranteed by Article 19 and the Fourteenth Amendment are the same.

Sanner v. Trustees of Sheppard and Enoch Pratt Hospital, 278 F. Supp. 138 (1968).

The power of the legislature to impose conditions upon the right to turn to the courts for redress of grievances must be exercised within constitutional limits. Jones v. Union Guano Co., 264 U.S. 171 (1924). As stated by this Court in Jones,

> "[t]he Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of the distinction is real and the condition imposed has reasonable relation to a legitimate object."[8] (Emphasis supplied)

The exhaustion doctrine in this case, therefore, if considered applicable, pertains only to the "suit of specified kind or class", i.e., whether the Blumbergs' permits should be restored. This decision, strictly limited to the question of the restoration of the permits, is not a condition precedent to bringing an action for conspiracy, tortious

---

[8] See also Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, 165 U.S. 150 (1897); Traux v. Corrigan, 257 U.S. 312 (1921).

interference with vested property rights, deprivation of property without due process of law or a taking without compensation associated with the bad faith actions of government. Such causes of action are recognized under Maryland law and protected by the Federal Constitution. Arnold v. Prince George's County, 270 Md. 285, 311 A.2d 223 (1973). If the Blumbergs are denied access to the courts with regard to their tort and constitutional claims, which claims are independent of the specified type for which the Court of Appeals found that administrative review is required, there is a plain violation of the guarantees of the Federal Constitution insuring (i) access to the courts, (ii) protection from deprivation of property by the State without due process of law and (iii) protection from the taking of property for public use without just compensation.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

Joseph P. Blocher
Counsel of Record
Barbara A. Sears
8720 Georgia Avenue
Fifth Floor
Silver Spring, MD 20910
(301) 588-8580

Attorneys for Petitioners